IN THE SUPREME COURT OF GEORGIA

HENRY ARTHUR DRAKE,	:	
Appellant	:	
VS.	:	CASE NO. 38034
STATE OF GEORGIA	:	
Appellee	:	

BRIEF OF APPELLANT

ON APPEAL FROM
THE SUPERIOR COURT OF MADISON COUNTY

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JURISDICTIONAL STATEMENT

This case is an appeal from the Order of the Superior Court of Madison County, Georgia, entered on July 24, 1981, denying Appellant Drake's Extraordinary Motion for a New Trial on charges of murder and armed robbery for which he is currently facing sentences of death and life imprisonment, respectively. Jurisdiction over this appeal lies in the Supreme Court pursuant to Ga. Code Ann. §2-3104 (Art. VI, Sec. II, Para. IV).

ISSUES INVOLVED

I. Whether the trial court erred in denying Appellant's Extraordinary Motion for New Trial where the only witness to implicate the Appellant in the crimes, and without whose testimony Appellant's convictions could not stand, has recently admitted, in testimony and under oath, that his trial testimony accusing the Appellant of the crimes was false and that it was he alone, and not the Appellant, who commited the murder and robbery. (Enumeration of Error #1).

II. Whether the trial court erred in denying Appellant's motion to be present at the evidentiary hearing on his Extraordinary Motion for New Trial. (Enumeration of Error #2).

STATEMENT OF THE FACTS

On September 1, 1977, Appellant, Henry Arthur Drake, was convicted of the murder and armed robbery of a Colbert, Georgia barber and was sentenced to death and life imprisonment, respectively, for those crimes.

The key prosecution witness against the Appellant at trial was William Campbell, a co-defendant who had been separately tried and convicted for the same crimes almost a year before Appellant Drake's trial. Campbell's testimony at both his own trial and that of Drake was that Appellant Drake committed the crimes and that Campbell witnessed the crimes as an innocent bystander. Campbell was the only witness to implicate Appellant in the crimes. Appellant Drake maintained his innocence throughout the proceedings, taking the stand in his own defense and denying Campbell's allegations.

On April 2, 1981 Campbell executed a sworn affidavit (attached hereto as Appendix A and to Appellant's Extraordinary Motion for New Trial as Exhibit A, R: 18-19) admitting that he lied when he testified that Henry Drake committed the crimes against the barber and further admitting that he alone was responsible for the death and robbery of the barber. On the basis of this affidavit an Extraordinary Motion for New Trial was filed on Appellant's behalf. (R:14-25).

A hearing on said motion was scheduled for July 7, 1981 at the Elbert County courthouse. Appellant Drake filed a timely motion to be present at this hearing (R:42-43); however, said motion was denied (R:46), and the hearing was held without the

Appellant's presence over the objection of Appellant's counsel (HT:3-4).

At the hearing Campbell reiterated what he had said in his affidavit. His testimony was that he lied at both his own trial and Appellant Drake's trial when he testified that Henry Drake beat and robbed the barber and that it was he alone, and not Drake, who committed the crimes. (HT:9, 12-16, 22, 26-35, 43-44, 47, 52, 60-61). He explained that he lied and blamed the crimes on Drake because he was mad at the Appellant. (HT:22). He testified that at first he was mad because he thought Appellant had turned him into the authorities. He believed this because, when the Georgia authorities came to Virginia to pick him up they had the watch which Campbell had taken from the barber and had given to Appellant before leaving Georgia (HT:23-24). He also believed that Appellant had turned him in because the police were waiting for him at the bus station in Norton, Virginia and the Appellant was the only one who knew where he was going. (HT:25-26). He remained angry at Appellant Drake because Drake treated him ugly when the authorities brought him back for trial telling Campbell he hoped he would 'get the chair' before his trial and that he and his family were glad Campbell 'got the chair' after Campbell had been convicted and sentenced to death. (HT:27-29). Campbell testified that he wanted to pay Drake back for the way he treated him (HT: 27-29).

Despite Campbell's testimony that he had lied at Appellant's trial and that the Appellant did not commit the crimes of which he was convicted, which testimony was unrefuted by any

evidence from the state, the trial court entered an order denying the Appellant's motion for a new trial. (R:78). It is from this order that Henry Drake now appeals.

ENUMERATION OF ERRORS

I.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S EXTRAORDINARY MOTION FOR NEW TRIAL.

II.

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO BE PRESENT AT THE EVIDENTIARY HEARING ON HIS EXTRAORDINARY MOTION FOR NEW TRIAL.

ARGUMENT AND AUTHORITY

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S EXTRAORDINARY MOTION FOR NEW TRIAL.

Appellant Drake recognizes that the granting of new trials on the basis of newly discovered evidence is not favored. However, new trials are mandated under Georgia law if the newly discovered evidence meets the criteria set out by this Court in Bell v. State, 227 Ga. 800 (1971). Those criteria are: (1) that the evidence has come to the knowledge of the movant since trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that the only effect of the evidence will not be to merely impeach the credit of a witness.

That Appellant's motion for new trial met the fifth requirement above is not disputed as both the witness' affidavit and his live testimony were presented in conjunction with the motion.

It is the Appellant's contention that the new evidence presented by his motion clearly met the remaining five requirements of Bell as well and demonstrated the extreme circumstances which compel the admittedly extreme remedy of a new trial.

A. Appellant's new evidence meets the criteria for granting a new trial.

(1) The evidence has come to the knowledge of the movant since the trial and it was not owing to want of due diligence that he did not acquire it sooner. (Requirements (1) and (2) from Bell v. State, supra).

By its very nature, evidence consisting of the sworn statement of a witness that his trial testimony was false is not available to a defendant until after the testimony has been given at trial. Moreover, no amount of diligence on the part of a defendant will produce such a statement until the witness is willing to make it.

In this case the witness, Campbell, did not admit that his trial testimony against Appellant Drake was false until long after the trial and even the direct appeals in Appellant's case were over. Thus, there is no question but that the first requirement of Bell, supra, that the evidence has come to the knowledge of the movant since the trial, has been met in this case; and, in fact, the state did not dispute that requirement (1) had been satisfied.

What the state did contend below was that Appellant's motion did not comply with the due diligence requirement of Bell, supra, (Requirement (2) of Bell v. State, supra). In support of this contention the state relied primarily upon an affidavit of

Appellant's prior counsel, August Siemon, which was attached to Appellant's Extraordinary Motion for New Trial as Exhibit "B" (R:20-21), in which Siemon stated that in May or June of 1979 William Campbell admitted to him that he had lied during Appellant's trial.

As an initial matter Appellant would point out that the affidavit of Attorney Siemon was not offered in evidence by the state at the July 7th hearing in support of any contention and is not, therefore, evidence as such. However, even had it been received in evidence the affidavit in no way demonstrates a lack of due diligence by Appellant or his counsel.

First, Appellant submits that it is not necessary in a motion for new trial on the basis of newly discovered evidence that Defendant's motion be brought immediately after the discovery of any new evidence. As a careful reading of Bell v. State, supra, and other cases dealing with the diligence question will reveal, the requirement of due diligence is directly related to the first requirement set out in Bell, supra at 805, namely, "(1) that the evidence has come to his [the party moving for a new trial] knowledge since the trial," (emphasis added). What the cases are requiring the movant to show is that the evidence was not known to him at the time of trial; and that the evidence could not have become known to the movant prior to trial through exercise of due diligence. [Lakes v. Lakes, 171 Ga. 692 (1930); Bradley v. Bradley, 232 Ga. 717, 718 (1974); Emmett v. State, 232 Ga. 110, 119 (1974)]. In other words, in order to prevent deliberate "sand-bagging", the Court will not grant a new trial on the basis of newly discovered evidence if the "new" evidence could have been discovered in time to use it at trial

had the movant exercised due diligence in preparing for trial. This is clearly not the case here.

Using the same logic in the context of extraordinary motions for new trial, the diligence requirement has in some cases been extended so as to require that the Defendant could not have discovered the evidence in time to incorporate it into his ordinary motion for new trial if one was filed. Gaddis v. State, 245 Ga. 200 (1980). However, in no case has the requirement of due diligence in relation to newly discovered evidence been extended beyond the time for an ordinary motion for new trial. Since the evidence establishes that Campbell was not willing to admit his perjury until years after any ordinary motion for new trial could have been brought, it is clear that the Defendant's motion is timely and diligent, regardless of whether Campbell admitted to Attorney Siemon in May or June of 1979 that his trial testimony against Drake was perjurous.

Furthermore, even if the due diligence requirement of Bell were read to require that motions for new trial be filed immediately after the discovery of the new evidence, Attorney Siemon's affidavit, if evidence at all, does not demonstrate a lack of such diligence.

The newly discovered evidence presented by Appellant's motion is not the statement of Campbell to a third party that his testimony at Appellant Drake's trial was false. Such statements have repeatedly been held to be inadmissible hearsay which will not support a motion for new trial. Timberlake v. State, 246 Ga. 488, 492 (1980); Robison v. State, 114 Ga. 445 (1901); Lyon v. State, 22 Ga. 399 (1857); Daniel v. State, 65 Ga. 199 (1880); and see Section B(1) of Argument, infra. It is instead Campbell's live testimony that the story he told at trial was false. Thus,

Attorney Siemon's failure to file a motion for new trial on Drake's behalf merely on the basis of a declaration Campbell may have made to him could not be attributed to lack of diligence because that declaration would not have constituted admissible evidence upon which to base such a motion. If Siemon had moved for a new trial at the time of his discussion with Campbell and had relied on his testimony of what Campbell had told him, the motion would have surely failed. It is only because Campbell recently agreed to testify in court about his trial lies that Drake's motion for new trial has become meritorious. The State would argue that Drake was not diligent because he did not file his motion at a time when he would surely have lost because of the lack of competent evidence. There is simply no merit to this argument.

(2) The new evidence is not cumulative only nor is impeachment of a witness' credibility its only effect. (Requirements (4) and (6) of Bell v. State, supra).

The evidence presented by Appellant's motion for new trial is not merely cumulative or impeaching. The affidavit and testimony of William Campbell not only contain new, distinct and material facts about the commission of the crime for which Henry Drake was convicted which were not testified to at trial, but they also present evidence of a higher and different grade on the point of Henry Drake's innocence in the form of a confession by the only living "eye witness" to the crime - the perpetrator himself. This evidence does not serve merely to strengthen the defendant's contention of innocence, but, if believed, would in and of itself establish his innocence. Thus, while the evidence will have the effect of impeaching the credit of the State's key

witness, this will not be the only effect. See Bell v. State, supra. This evidence therefore affords a basis for a new trial.

C. The new evidence is so material that it would probably produce a different verdict.

As for the remaining criterion that the evidence "is so material that it would probably produce a different verdict", because Campbell's testimony was the only evidence implicating Drake in the commission of the crimes, there can be no dispute that, if believed, Campbell's retraction of his trial testimony and his admission of his own, rather than Drake's, guilt, would most certainly have produced a different verdict at Henry Drake's trial. Moreover, even if the jury did not believe all of Campbell's recent version of the crimes, it is more than probable that having it before them for consideration would have created enough question in their minds as to Appellant's guilt so as to result in a different verdict, particularly in light of the lengthy deliberations it took for them to reach a guilty verdict in the case even with Campbell's testimony accusing Drake of the crimes (TT: 497-500).

Nevertheless, the state's objections to the Appellant's motion seemed to relate, for the most part, to this third requirement of Bell v. State, supra, which has also been stated by the court as "whether or not the new evidence would likely produce a different result upon another trial". West v. West, 200 Ga. 115 (1945); Bradley v. Bradley, 232 Ga. 717, 718 (1974).

The two basic arguments of the State which were seemingly directed to the materiality requirement of Bell were: (a) that the affidavit and testimony of Campbell recanting his prior

trial testimony were not credible or worthy of belief and therefore would not have produced a different verdict, and (b) that there was sufficient other evidence, aside from Campbell's trial testimony, to support Drake's conviction.

In order to analyze either of these two claims a consideration of the following outline of the trial testimony in the case is necessary:

On the evening of December 5, 1975, the Appellant, Henry Drake, his girlfriend, Mary Carruth, and William Campbell, a friend who was living with Drake and Carruth at the time (TT 157-159), drove from Madison, Georgia, where the three were living, into Colbert, Georgia (TT 161-162) where Henry Drake's mother and other family members lived. (TT 407). The Appellant and his girlfriend dropped Campbell off across the street from the barbershop in Colbert so that he could get a haircut (TT 161-162, 360, 409), and they continued on to the Appellant's mother's house (TT 410-411).

At about 5:00 p.m. Campbell was observed leaning on a car outside the barbershop (TT 283-284). At 6:00 p.m. he was no longer outside but the lights in the barbershop were on (TT 284).

At 9:00 p.m. that evening C. E. Eberhart, age 74, was found critically wounded on the floor of his barbershop (TT 290). He had received blows to the head from a clawhammer and a stab wound (TT 149-150). The floors and walls of the barbershop were smeared with blood as though an extended struggle had taken place (TT 290, 307). Mr. Eberhart was hospitalized but remained in a coma until his death several months later (TT 152-155).

Several days after the attack on Mr. Eberhart law enforcement officers went to the home of Appellant Drake, where Campbell

had been staying, to search for Campbell and possible evidence (TT 122, 309, 358, 360). Campbell was gone but a watch later identified as belonging to Mr. Eberhart was found in Campbell's room in a dresser with Campbell's clothes and papers (TT 129, 133, 322). Campbell was arrested by Georgia authorities after he was located in Virginia. He had been arrested by Virginia authorities only one week after the attack on Mr. Eberhart for shooting a woman during a robbery (TT 195, 197). Subsequently, the Appellant was also arrested.

Appellant Drake was originally indicted along with Campbell but due to a challenge to the grand jury made by Drake's appointed attorneys he was reindicted, and his case did not go to trial until one year after Campbell had been tried and convicted of the murder and armed robbery of Mr. Eberhart.

At his own trial Campbell claimed that he was getting a haircut from Mr. Eberhart on the night Eberhart was wounded when the Appellant came in and began beating the barber over the head with a hammer. He testified that he tried to stop the Appellant but that the Appellant struck him with the hammer when he did so.

The jury obviously disbelieved Campbell's version of the events as they convicted him of both the murder and armed robbery of Mr. Eberhart, recommending the death sentence for the murder. Nevertheless, one year later the State called Campbell as their key witness in the trial of the Appellant and had him reiterate this same story before the Appellant's jury (TT 167-170, 188).

William Campbell was the only witness in Henry Drake's trial who in any way implicated Drake in the murder and robbery of Mr. Eberhart, and his testimony was strikingly different from

the account given by the other witnesses at trial.

Henry Drake and Mary Carruth both testified that after dropping Campbell off for his haircut, they drove to Drake's mother's house where they had supper and visited for about two hours (TT 381-382, 410). Drake's mother, brother and brother-in-law all confirmed that Henry and Mary were at Drake's mother's that evening (TT 429, 432, 434). Appellant Drake and Mary Carruth further testified that they picked Campbell up across the street from the barbershop on their way out of town (TT 410-411) and that he told them that he had been in a fight with the barber (TT 352, 422).

Drake testified that about 3:00 a.m. that night Campbell woke him (Drake) and wanted Drake to drive him (Campbell) back to Colbert because he left his knife and some barber clippers he took from Mr. Eberhart there. [Barber tools were found outside the barbershop (TT 366).] Drake refused to carry him (TT 412, 413). The next day, Drake went back to his mother's and borrowed a radio. When he got back to Madison, Campbell told Drake that he (Drake) and Mary were going to drive him to Atlanta (TT 414). Campbell had a gun (TT 414) so the Appellant drove him to Atlanta and let him out (TT 415).

Campbell's testimony, which covers over 100 pages of transcript, varied significantly from that of Mary Carruth and Henry Drake. The thrust of that testimony was that Drake, and Drake alone, robbed and murdered Mr. Eberhart and that Campbell himself was merely an innocent bystander. However, Campbell's story was not only incredible in and of itself, but it was also filled with contradictions and inconsistencies throughout.

To begin with, Campbell stated that after Drake let him out he hung around the laundromat for ten or fifteen minutes (TT 204). He then walked over to the barbershop. Mr. Eberhart was cleaning up but said he would cut Campbell's hair after he finished sweeping up, so Campbell held the dustpan for him (TT 205).

At first Campbell stated that he and Eberhart did not converse while his hair was being cut (TT 212); however, on recross he admitted that he asked Eberhart for a job while he was cutting his hair (TT 245) [Campbell testified earlier that he had been looking for a job in Colbert, but no one would give him one (TT 224). There was also testimony that Campbell had been a barber at one time (TT 366 to 367)].

When the State began questioning Campbell as to the Appellant's involvement in the crime, Campbell first stated that he did not see Drake in the barbershop but saw him only in front of the barbershop before and after he (Campbell) got his hair cut (TT 164 to 165). After considerable proding by the District Attorney, Campbell changed his story and claimed that while he was having his hair cut, Drake came in with a black wig on (Campbell said he didn't recognize him at first), walked around behind the barber chair and hit Eberhart in the head with the hammer (TT 168).

At Drake's trial, Campbell said he watched Drake come in and walk around Eberhart. However, as Drake's trial counsel brought out on recross, at his own trial Campbell testified that he did not know Drake was there until he heard Eberhart groan twice and turned around to see Drake hitting him (TT 246). Drake's counsel

also brought out on recross that Campbell did not mention any wig at his own trial (TT 238, 243).

As to the wig, Campbell testified first that he did not know what happened to it after the beating (TT 170). Later, he testified that during the struggle Eberhart pulled the wig off Drake (TT 208,249). Still later he said Drake wore the wig back to the car (TT 213).

On direct, Campbell said that when Drake came into the shop he told Eberhart that he was going to "rob him and take his money" (TT 169), but on cross examination, he said Drake did not say anything when he came in (TT 207).

Campbell claimed that he tried to stop Drake from hitting the old man at which time Drake hit him (Campbell) in the head with the hammer (TT 169, 208). On cross-examination, elaborating on being hit by Drake, Campbell, already aware of the physical evidence the State was going to present from his own trial, conveniently related that when he was hit he fell out of the barber chair over near the door stating that "that's where they got my blood stains, off the door" (TT 208). [The State did, in fact, present testimony of a forensic scientist that Type A blood scrapings were taken from the door frame (TT 266); Campbell was typed as A (TT 264), while Eberhart and Drake were typed as O (TT 264, 271).] But Campbell's story of falling by the door was inconsistent with testimony he gave at his own trial that Drake picked him up and set him by the door (TT 211). This testimony from the previous trial was also inconsistent with Campbell's statement on cross that Drake did not touch him after hitting him with the hammer (TT 209).

Campbell's testimony was particularly inconsistent as to the hammer itself. The hammer was found in the back of a pickup truck located behind the barbershop and Campbell admitted that he threw it there (TT 175), but he had several versions as to where he threw it from. First he stated only that he picked the hammer up at the barbershop and threw it toward the truck (TT 175). On cross examination, he specified that he picked the hammer up off the barbershop floor as he was going out the door (TT 215), and that he did not know where Drake had got it from (TT 215). However, after being asked if he had ever said that he had found the hammer in Drake's car, he changed his story and responded, "That's right. As a matter of fact, he kept it in there all the time. He worked on that old car with it." (TT 214). Defense counsel then read Campbell's testimony from his own trial in which he claimed that he found the hammer in Drake's car and threw it "out of the car" (TT 216). [This version was inconsistent with Campbell's earlier statement that the car was parked up the street at the store (TT 126).] When asked to clarify which he had done, i.e., thrown it from the barbershop or thrown it from the car, Campbell changed his story for the third time (TT 216). He claimed that Drake carried the hammer out of the barbershop, laid it down, then stepped on it so that it bounced back to near the door where Campbell picked it up. He stated that he (Campbell) hid the hammer inside the car until he could get back to the door (TT 216). At this point defense counsel gave up hope of getting a straight story about the hammer from Campbell and went on to something else. But further irreconcilable inconsistencies in Campbell's testimony continued to develop.

On direct, Campbell testified that after the incident in the barbershop he did not have any blood on his clothes and did not pay any attention to whether Drake had any blood on him (TT 172). But on cross and recross, he claimed that there was blood on his own shirt (TT 218, 248), saying that he threw the bloody clothes away, but then changed his story to say that Drake or Mary threw them away (TT 248-249).

On direct, Campbell testified that Mary Carruth was behind the barbershop somewhere during these events but that he did not know exactly where (TT 176). On cross, he testified that she was "at the door, beside the door...around to the corner door," and that she "come to the door" (TT 219).

Campbell testified that he, Mary and Drake walked to the car (TT 177) which was parked up the street at the store (TT 176) and then drove to the cemetery and drank a beer (TT 177,220). He next testified that he went to sleep in the back seat and when he woke up they were back in Madison (TT 178). When asked, "Do you recall the next day?", Campbell responded, "No, sir, Henry told me about...the next day."

Campbell went on to testify that the next day (Saturday) Drake told him that he (Campbell) would have to leave because the barber was expected to die (TT 179-186, 225). While being examined on direct as to this particular portion of events, Campbell was asked what Drake said. He responded, "He said they were looking for that barber to die...was robbed that night. I didn't know about it. He told me about it." (TT 184) When questioned further about what was said, he testified that "he

(Drake) told me, 'Bill, you've got to leave. I hate to say this, but you got to leave.' I asked him why, and he said, 'Well, what happened last night--they look for that old man to die--.' I was pretty well drinking and I didn't think the old man was hurt that bad." (TT 185) (Emphasis added, under'ined portion is Campbell's statement to the court).

Drake then drove Campbell to Atlanta and he (Campbell) caught a bus to Norton, Virginia (TT 179-186, 226) where he shot a woman in the hip only a week later while robbing a salvage company (TT 195, 197). Campbell pled guilty to that robbery (TT 186).

Georgia law enforcement officers picked Campbell up in Virginia and returned him to Georgia to face the Eberhart murder and robbery charges. On route Campbell made a statement regarding the Eberhart killing that "You know when a fellow gets to drinking...I didn't mean to do it." See Campbell v. The State, 240 Ga. 352 at 353 (1977).

Campbell's criminal record at the time of Drake's trial included pleas of guilty to two counts of sodomy in 1967 (TT 197), a plea of guilty to burglary in 1967 (TT 198), a conviction for robbery in 1969 which resulted in a life sentence subsequently reduced to twelve years (TT 198), a plea of guilty to the robbery in Norton, Virginia and convictions for the robbery and murder of Mr. Eberhart in 1976 for which he received a life sentence and the death penalty (TT 187, 199). Campbell testified that in all he had spent around twenty years in jail (TT 194).

In sum, an eye witness testified to seeing Campbell across the street from the barbershop at about 5:00 p.m. on the day of the crime (TT 283). Blood scrapings taken from the handle of the

murder weapon were found to be type A (TT 265, 269), Campbell's blood type (TT 264). On the other hand, there was no physical evidence associating Drake with the crime. No finger prints taken at the scene were matched to Drake (TT 259), nor was there any identification of O positive blood (Drake's blood type, TT 271) found at the barbershop. The only testimony to place Drake at the barbershop or to implicate him in the murder or robbery was Campbell's testimony, the inconsistent and contradictory testimony of an alleged accomplice and a man with a history of violent crime.

a) The credibility of the new evidence and its source

The state contended below that because of a history of felony convictions as well as prior inconsistent statements in this case, Campbell is unworthy of belief and, for this reason Appellant's motion should have been denied. This argument is somewhat ludicrous in light of the fact that the State did not hesitate to use this same unreliable and incredible witness as its key witness to obtain the convictions and death sentence against the Appellant, although Campbell's criminal record and inconsistent statements were well known to the State at the time of trial. The State should not be heard to protest Campbell's credibility now when they espoused it earlier by using his testimony.

Granted, in the ordinary case some showing as to the credibility of a movant's witness or witnesses would be helpful to the trial judge in deciding a motion for new trial. However, even in the ordinary case it is no longer necessary that a

defendant make such a showing in order to prevail on a new trial motion as Ga. Code §70-205, which used to require such showings, was repealed by Acts 1965, pp.18, 39.

More important, the State's claim that Campbell is not credible and, thus, that his recantation and claim of Drake's innocence is not credible, misses the whole point of a motion for new trial on newly discovered evidence. The issue is not whether Campbell's 'new' version of the crime is true in every detail, or even whether it is more believable than his prior trial testimony. The question is simply whether his exculpation of Appellant, coupled with the fact that there was no direct evidence and only weak circumstantial evidence of Drake's guilt aside from Campbell's trial testimony, probably would have been enough to result in a different verdict. The basis of Appellant's motion for new trial is that there is now substantial new evidence of his innocence as well as evidence that the state's key witness gave perjured testimony at Drake's trial. It is not necessary that Campbell's hearing testimony be completely, or even largely credible to result in a new trial anymore than it was necessary for it to be completely credible at trial for the State to claim a conviction based upon it. All that is necessary is that Campbell's recent admission that he and not Henry Drake committed the offense, no matter how much of it is true, would probably create a reasonable doubt about Drake's guilt in the minds of a jury. Thus, the court need not conclude that Campbell in fact committed perjury in order to grant a new trial. Specifically, the question is not whether Campbell's present

statement is true, it is whether he will give this testimony at a new trial, something no one contests, and if he does give that testimony, whether there is a reasonable likelihood that the verdict will be different.

Even if the issue on the motion was which of Campbell's two stories is more worthy of belief, which it is not, there is every reason to believe Campbell's recent testimony in support of Appellant's motion over his trial testimony. As between the contradictory positions both taken under oath, the indicia of reliability weigh in favor of the recanting version.

First, the evidence on the motion revealed that Campbell was testifying at the hearing contrary to the advice of his attorney (HT: 6-7, 45). The evidence further demonstrated that Campbell was aware that his admissions at the hearing could subject him to a prosecution for perjury and that he was aware of the possible penalties upon conviction of that offense. (HT: 6-7, 45). (The potential penalty for such a conviction when the perjury was given in a capital case is life imprisonment under Georgia law. Ga. Code Ann. §26-2401.) The evidence also showed that Campbell's attorney advised him of the possible ramifications that his hearing testimony could have on his ongoing appeals. The affect of Campbell's admission of responsibility in the killing and his exoneration of Drake place his own appeals, which contend that the evidence against him was insufficient, in extreme peril and his life in grave jeopardy.

It is unlikely that Campbell would place his own appeals in extreme peril by confessing to the beating of Mr. Eberhart simply

out of friendship for the Appellant. It is much more plausible that Campbell, motivated by anger from the belief that Drake had turned him into the police (HT: 22-24) and had told them where to find him (HT: 25-26), would falsely accuse Drake at trial of perpetrating the crime to get back at Drake (HT: 28-29) -- not to mention to try and save himself.

Second, the State contended below that inconsistencies as to ancillary facts between Campbell's testimony at the hearing and Appellant Drake's trial testimony make Campbell's current testimony unbelievable. Some of the inconsistencies pointed out by the State were that Campbell claimed that when he gave Drake the watch he had taken from Eberhart it had a band on it and that Henry kept the watch and was wearing it on the morning Campbell left Georgia, whereas Drake claimed that the watch had no band and that he therefore gave it back to Campbell. Campbell also testified that Drake urged him to leave Colbert and that Drake voluntarily drove him to Atlanta, whereas Drake testified that Campbell decided to leave on his own and had forced Drake to drive him. While the State argued that these inconsistencies between the stories of Drake and Campbell made Campbell's story less reliable, these inconsistencies actually lend more credence to Campbell's admissions. If, in fact, Campbell was simply lying to help Drake, why would he not exculpate Drake altogether? Why would he implicate him as far as receiving the watch and driving Campbell to Atlanta?

Thirdly, contrary to the State's contentions, Campbell's testimony on Appellant's motion is not so inconsistent with the

physical evidence evidence at trial as to be totally incredible and unworthy of belief. In fact, for the most part the physical evidence is as consistent with Campbell's hearing testimony as it is with his prior trial testimony.

The only evidence presented at Appellant's trial that is even arguably inconsistent with Campbell's recanting testimony that it was he alone who beat and robbed the barber is the minimal evidence urged by the State in support of its contention that a long and tiring struggle must have taken place, due to the large quantities of blood found all over the small barbershop and smeared on the walls, coupled with their contention that Campbell was not physically able to engage in such a struggle.

To begin with, the State's conclusion that Campbell could not have done the assailing alone is drawn from the lay opinion testimony of one law enforcement officer who gave his opinion of Campbell's medical condition and the physical limitations which that condition imposed on Campbell. This evidence is far from conclusive on Campbell's ability to commit the crimes alone.

The supposed evidence that a lengthy struggle had to have taken place is similarly inconclusive. In Campbell's testimony at the motion hearing he stated that after stabbing the barber and hitting him over the head a number of times he left him lying in the back of the barbershop near the storage room where they had been struggling (HT: 14-15). He testified that when he left the shop Eberhart was still conscious and was struggling to get up (HT: 15-16). The evidence at trial revealed that a large pool of blood was found in the area of the shop where Campbell claims

he left the barber bleeding (TT: 375, 536 - Exhibit S-6). It is quite conceivable, as Campbell testified, that his struggle with the barber was not particularly lengthy or drawn out, and that when he left, the shop was not covered with blood as it was found some three hours later when police arrived. It is possible that Mr. Eberhart, who was severely injured but was struggling to get up as Campbell left, continued to struggle over the two and one-half to three hours before police arrived to reach his feet and seek help. He may have crawled along the floor leaving separate pools of blood wherever he paused for rest. He may have at one point managed to stand up by pulling himself up on the barber chair and then inched his way along the wall with his head resting on the wall, leaving a trial of blood and hair behind. However, due to his injuries and loss of blood he was never quite able to make it out the door. The police found him by his barber chair still struggling to get up hours after the beating took place (TT: 303).

It is not necessary that the court believe that the above scenario is what actually happened. What is important is that this hypothetical explanation of the condition of the barbershop points out at least one plausible explanation of the evidence which is consistent with Campbell's current testimony that he alone and not Drake killed and robbed the barber.

It should be pointed out that the Appellant is not claiming that Campbell has suddenly become a person of good character and a totally reliable witness nor even that every detail of what Campbell has sworn to in connection with the motion is entirely

true and accurate. What the Appellant is claiming is that the core of Campbell's testimony that Drake did not have anything to do with the beating of the barber and that Campbell alone beat the barber for whatever reasons and under whatever circumstances is the truth, and that Campbell's testimony at Appellant's trial implicating Drake in the beating was a lie.

Since Appellant Drake, according to his own testimony at trial as well as the testimony of Mary Carruth and of Mrs. Helen Drake, was not present when the barber was beaten, he has no way of knowing whether the specifics of Campbell's recanting version of what happened are true. It is possible that Campbell, even while admitting to the crime, is still trying to make it easier on himself by claiming the homicide resulted from a fight or out of self-defense. However, it does not matter to Appellant's claim whether Campbell is now telling the whole truth. What matters is whether Campbell conceivably committed perjury at Henry Drake's trial when he said Drake committed the crimes and whether Drake is, in fact, conceivably innocent. It cannot be said as a matter of law that there is no reasonable possibility that the jury could find that Campbell's recanting of his earlier testimony creates a reasonable doubt as to the Appellant's guilt, especially in light of the very weak circumstantial evidence corroborating that testimony. Thus, a new trial is required by law.

The difficulty which Drake faces in presenting his motion can well be demonstrated by assuming for a moment that Drake is, in fact, innocent. Let us assume as Appellant Drake has always

claimed, and as Campbell now testifies, that Drake let Campbell out to get a haircut with no knowledge or intention that Campbell was going to do anything but get his hair cut; that Campbell alone, for whatever reason, fought with and robbed the barber; that Drake and Mary Carruth picked Campbell up from across the street at the laundromat on their way back from Appellant's mother's; that upon returning to Madison, Campbell told them that he had fought with and hurt the barber; that Campbell believed that Henry had turned him in and therefore tried to lay the crime upon Henry Drake by first lying to the police and then to the juries in his own and Drake's trial. Assuming these facts, where there are no other eye-witnesses to the crime, Henry Drake would have no way of proving that Campbell lied when he testified at his trial that Drake was the assailant except by Campbell's own admission that he had lied.

The Appellant has now presented to the Court new evidence of his innocence and the only evidence available to him to show that Campbell commited perjury at his trial. The Appellant cannot help it that that evidence of necessity comes from an unreliable source. The State had no qualm in using as their witness at trial against Drake, the same witness they now contend is untrustworthy and unbelievable. Campbell is the only source the Appellant has or could possibly have under the circumstances.

Where, as in this case, the recanting witness' story exculpating the Appellant is no less reliable than his story at trial, and cannot in any event be said to be wholly unworthy of

belief; and where the State presented no evidence to refute the witness' recanted version of the crime, the new evidence of the witness' recanting and exculpating the Appellant should be put before a new jury so that a jury which has before it all of the available evidence can decide the Appellant's guilt and his fate.

b) The sufficiency of the other evidence presented at trial

In an apparent effort to show that Campbell's testimony exonerating Drake of the murder and robbery does not meet the materiality requirement of Bell, the state urged various shreds of evidence which it contended established the Appellant's guilt even without Campbell's trial testimony. (See Tenth Defense, Response of the State to Extraordinary Motion for New Trial, R: 49).

Neither the circumstances cited by the State, individually or taken together, nor all of the other trial evidence combined, constitutes even marginal proof that Appellant perpetrated the murder and robbery, let alone sufficient evidence of guilt, absent Campbell's trial testimony. Further, as stated earlier, with the exception of Campbell's now recanted testimony, none of the so-called evidence of Appellant's guilt presented at trial is any more consistent with Appellant's guilt than it is with Campbell's admission that he and not Drake commited the crimes. In essence the only evidence of Appellant's guilt which the State has been able to assert is evidence that Drake was with Campbell prior to and after the crimes were commited and that they lived together. The only theory of guilt which such evidence can be

said to support is one of guilt by association, which is clearly not sufficient to justify a conviction and sentence of death.

This case is simply not one in which the other evidence presented at trial is so sufficient or so overwhelmingly conflicting with the new evidence of the movant's innocence that the Court is able to adequately predict as a matter of law that the evidence is not so material as to probably result in a different verdict. Carter v. State, 246 Ga. 328 (1980); Dobbs v. State, 245 Ga. 208 (1980); Snow v. State, 14 Ga. App. 489 (1914); Smith v. State, 148 Ga. 332 (1918).

Bell v. State, supra, is particularly instructive on the point in question. The appellant in Bell was convicted of armed robbery on the basis of two eyewitness identifications and fingerprints found at the scene and identified as his. Subsequently another individual admitted the robbery, making a statement to police that he and a friend of his had commited the crime and that appellant had nothing to do with it. Both this individual and the friend he implicated pled guilty to the robbery and were sentenced therefore.

The court had already ruled in its opinion that the evidence upon which the appellant was convicted authorized the verdict against him, but it went on to hold that that fact in no way precluded "the probability of a different verdict on another trial with the newly discovered evidence, since the evidence merely authorized, but did not demand the verdict". Bell at 807-808.

The Court pointed out in Bell that "the jurors are the ultimate judges of the credibility of witnesses" (at p.807) and

that the probability of their returning a different verdict cannot be calculated.

It observed that the newly discovered evidence, combined with the Defendant's denial of his guilt and the testimony of his alibi witnesses "might well authorize a different verdict, which is about as much probability as can be obtained under the evidence". Id. at 808.

Also of particular importance to Appellant Drake's motion is the further notation of the court in Bell that "[I]n numerous other cases an important element in the decision to allow a new trial has been the fact that the evidence sustaining the verdict was weak or unsatisfactory". Id. at 809 (cites omitted).

While the trial judge has wide discretion in the determination of motions for new trial, that discretion is not absolute, and the appellate courts will step in when there has been an abuse of that discretion. The Supreme Court found such abuse in the leading case of Bell v. State, supra, on circumstances far less extreme than in the instant case.

In light of the new evidence presented in Bell the Court found that justice demanded that a new trial be granted. In so doing the Court, citing from other Supreme Court opinions, made clear that "'(w)hile the statute states that a new trial 'may be granted', this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted, but on the contrary it means that in such a case a new trial must be granted. (cites omitted) 'we have searched the record and the State's brief and can find no countershowing by the State to the truth of these affidavits upon which the court could base the

exercise of its discretion. The court has seemingly passed upon the credibility of the affidavits and has said, in effect, that a jury could not believe them as a matter of law. We believe that the court abused its discretion when it denied defendant's motion for a new trial.' (cite omitted)." Bell, supra at 809. (emphasis added).

The Appellant believes that under the circumstances of his case -- where the only witness to link him with the crime for which he was convicted has, in sworn testimony, admitted that he alone committed the crime and that he committed perjury at the Appellant's trial when he implicated him in the murder and armed robbery; where the other evidence presented against the Appellant at trial is wholly circumstantial, extremely inconclusive and far weaker than the eyewitness and fingerprint evidence in Bell; where the State has presented no countershowing as to the truth of Campbell's recanted testimony; where Appellant presented alibi witnesses at trial; where the Appellant has continuously asserted his innocence, and where the Appellant's very life rests on the credibility of this new evidence -- justice demands that a new trial be granted and a new jury be empanelled to determine the credibility of this new evidence and, with this evidence before them, to re-evaluate whether the Appellant should live or die.

The Appellant believes that the denial of his motion for a new trial was, in light of Bell, supra, and the principles cited therein, an abuse of discretion.

As a final point, Appellant believes that the denial of his motion under the circumstances of this case, which indicate that

the conviction of Drake was based upon the perjured testimony of the State's key witness, violated the fundamental rights guaranteed him by the Constitution and Laws of the State of Georgia and by the Constitution of the United States, including the right to due process of law (Art. I, Sec. I, Pars. 1, 9, and 11, Georgia Constitution of 1976 (Code Ann. §§2-101, 2-109 and 2-111 respectively); Fifth and Fourteenth Amendments, United States Constitution); the right to a fair trial as embodied by Art. I, Sec. I, Par. 11, Georgia Constitution of 1976 (Code Ann. §2-111) and the Sixth and Fourteenth Amendments to the United States Constitution; and the right to be free from cruel and unusual punishment (Art. I, Sec. I, Par. 14, Georgia Constitution of 1976 (Code Ann. §2-114); Georgia Code Annotated §27-2505; Eighth and Fourteenth Amendments, United States Constitution).

B. The various other defenses to Appellant's motion put forth by the State do not justify the denial of a new trial under the circumstances of this case.

Appellant has demonstrated that the new evidence presented by his motion meets the technical requirements for such motions and, thus, entitles him to a new trial. Nevertheless, in the interest of being complete, Appellant will address the other reasons which the State emphasized below for denying his motion which have not yet been dealt with.

(1) Recanting of Testimony as Basis for New Trial

The State cited a number of cases below for the principle that 'a post-trial declaration by a State's witness that his former testimony was false is not a cause for a new trial'.

However, neither the cases nor the principle they seemingly espouse bar a new trial under the circumstances of this case.

First, the majority of cases which cite the principle urged by the State are inapplicable in that they do not involve new evidence in the form of an affidavit or sworn testimony of the recanting witness but, rather, deal with the situation where the new evidence is merely the hearsay testimony or the affidavit of a person to whom or within whose hearing the witness allegedly recanted his trial testimony. Morrow v. State, 36 Ga. App. 217, Kennedy v. State, 37 Ga. App. 161, and Richey v. State, 132 Ga. App. 188. It is understandable that mere hearsay evidence of a witness' recanting is not considered sufficient to constitute cause for a new trial. Indeed, the reasoning given by this Court in Felton v. State, 56 Ga. 85 (1876) for rejecting evidence of recanting as a ground for a new trial is persuasive in such cases.

A number of other cases cited by the State below only state the principle without indicating the source of the new evidence involved so that they cannot be said to control the instant case. (See, i.e., Fowler v. State, 187 Ga. 406 (1939), Rogers v. State, 129 Ga. 589 (1907) and Sutton v. State, 238 Ga. 336 (1977)).

In Pullin v. State, 237 Ga. 759 (1976), a deposition of a co-defendant admitting that he commited the crime was rejected as a ground for new trial, but that case did not involve the witness recanting perjured testimony that he had given against the defendant nor did it clear the defendant of being present when the apparent robbery-murder took place. Instead the new evidence was merely cumulative of the witness' previous testi-

mony that none of the defendants knew anyone was going to be killed.

Still other cases which supposedly stand for the principle cited by the State are distinguishable because substantial evidence of the defendants' guilt was present aside from the recanted testimony of the witness. Sutton v. State, supra, (three other eyewitnesses); Smith v. State, 148 Ga. 332 (1918).

The State cited no cases in which the principle they espouse was applied to deny a new trial where the new evidence was the direct testimony of the recanting witness himself, and where the testimony that witness was recanting was the sole or even the primary evidence linking the defendant with the crime as is the situation in the instant case.

Evidence by a witness himself recanting his trial testimony should not automatically be discounted but should be analyzed under the same criterion for granting a new trial as any other newly discovered evidence. This is the approach which was taken by this Court recently in Dobbs v. State, 245 Ga. 208 (1980). The Court upheld the denial of a new trial in that case where the co-defendant recanted his trial testimony implicating the appellant in the crimes of which he was convicted. The Court found that under the facts of the case the new evidence did not meet the requirement that the evidence be so material that it would probably produce a different verdict because, as opposed to this case, not only did the co-defendant's post-trial statement in Dobbs fail to exclude the appellant as the murderer, but there was sufficient other evidence at trial, including testimony of eyewitnesses, to authorize the verdict even without the co-defendant's testimony.

While this Court did not grant a new trial in Dobbs, its analysis implied that recanted testimony can, in fact, constitute grounds for a new trial just as any other newly discovered evidence if it meets the proper standards.

(2) Necessity of Perjury Conviction (Sixth Defense, Response of the State to Extraordinary Motion for New Trial, R: 48)

The State also contended below that the absence of a perjury conviction against Campbell was a sufficient justification to deny Appellant's motion for a new trial, citing Ga. Code Ann. §110-706.

As an initial matter Ga. Code Ann. §110-706 represented specific statutory authority for setting aside a verdict on the limited basis that the verdict was illegal because it was based upon perjured testimony. Mitchell v. State, 120 Ga. App. 447 (1969); Self v. State, 108 Ga. App. 201 (1963). The statute itself did not deal with motions for new trial based on new evidence of a defendant's innocence which just happened to involve the admission of perjury.

In any event, however, Ga. Code §110-706 was repealed by the CPA of 1966 (Acts 1966, p.609,687, as amended by Acts 1967, p.226 et seq.). Thus, it is no longer required that the witness be convicted of perjury before setting aside a verdict based on perjured testimony. Freeman v. State, 130 Ga. App. 718 (1974).

Seemingly, the State's position is that even though a perjury conviction is not a mandatory prerequisite to a new trial, a trial court may, and should, in its discretion deny a motion for new trial if there has been no perjury conviction.

Appellant strongly disputes this assertion and submits that a trial court has no such discretion where the requirements

The State is apparently referring to Campbell's testimony that he gave Drake the watch he had taken from Eberhart and that Drake voluntarily drove him to Atlanta the day after the crime. For the Appellant to prevail on this motion it is not necessary that he be innocent of any wrongdoing whatsoever. Even assuming that he participated to the extent of assisting Campbell in leaving the area and even accepted the watch stolen from Eberhart, it is unlikely that a jury would convict the Appellant of murder and armed robbery on the basis of this limited involvement. It is even less likely that they would sentence Appellant to death based on this limited after-the-fact participation in the crimes. Therefore, at a very minimum a new sentencing trial would be required even if the State's Eighth Defense were accepted.

II. The trial court erred in denying the Appellant's motion to be present at the hearing on his Extraordinary Motion for New Trial.

Appellant is aware of this Court's recent opinion in Dobbs v. State, 245 Ga. 209 (1980) upholding the denial of a request by a defendant in a capital case to be present at his extraordinary motion for new trial. Although Appellant disagrees with the Court he recognizes that in that case the Court declined to hold that under the evolving standard of due process applicable to death penalty cases as indicated by the United States Supreme Court in cases decided since Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), a death penalty defendant generally is "allowed to be present at each step of his appeals process".

However, the Appellant does not believe the Court's refusal to so hold precludes the Appellant from prevailing on this issue.

The background holding of the Court in Dobbs, supra, was that in Georgia "the general right of one accused of a felony to be present during the course of his trial does not extend to post-verdict procedures such as a motion for new trial, at which only questions of law, not questions of fact, are determined."

While under the above holding a defendant is not generally entitled to be present at post-trial motion, Appellant contends that in certain circumstances, his case being one example, the exercise of sound judicial discretion is abused if the presence of the defendant is denied.

Initially it should be noted that in this case, in contrast to Dobbs who waited until the eve of the hearing to request that he be present, Appellant requested to be present at the hearing promptly after the hearing date was set and in plenty of time for the logistics of his transportation to be arranged by the State. Furthermore, since the witness for the hearing was transported to the hearing from the same institution as Appellant, little more effort, expense or inconvenience could have resulted from Appellant also being brought along. Thus, the burden on the State did not weigh heavily in denying the Appellant's request to be present.

On the other hand the interest of the Appellant in being present at the hearing on his Extraordinary Motion for New Trial was considerably greater than the average motion for new trial. Whereas, in general motions for new trial tend to involve alleged

errors or irregularities in the conduct of the trial and proceeding, attending trial, Appellant's motion in a real sense involves factual questions relative to his guilt or innocence. Moreover, the State created additional factual issues by raising arguments in defense against Appellant's motion such as the allegation that inconsistencies between Campbell's new evidence and the physical evidence at trial justify denial of the motion. Furthermore, unlike in Dobbs where not only did the new evidence fail to exclude the Appellant as the murderer, but there was sufficient other evidence at trial, including testimony of eyewitnesses to support the verdict, in this case the new evidence presented at the motion hearing was from the only witness to implicate the Appellant discrediting the only testimony given at trial which could have supported the verdicts of guilty. Under these circumstances a Sixth Amendment interest of the Appellant in being able to confront the person who had been his only accusor at trial presented itself which does not exist in most other post-judgment proceedings. Moreover, the critical nature of the new evidence mitigated in favor of the Appellant being afforded every possible opportunity to better present that evidence at the motion hearing under principles of due process. Appellant's presence was requested at the hearing because Appellant's counsel had not represented the Appellant at trial and because particular surrounding facts and circumstances of Campbell's hearing testimony might be known to Appellant but not his counsel. Appellant, in his motion to be present, notified the court of these reasons why his presence would be needed to assist

counsel with the presentation of the motion and, in particular, with the examination of Campbell.

In the context of habeas corpus proceedings the federal courts, while generally holding that the presence of the defendant at such proceedings is not required, are careful to note that whether the prisoner should be produced depends upon the issues raised by the particular case, U.S. v. Hayman, 342 U.S. 205, 223, 72 S.Ct. 263, 96 L.Ed. 232 (1952), and that if the motion raises a disputed factual issue or there are substantial issues of fact to be resolved, that the defendant's presence is required. U.S. v Hayman, supra; U.S. v. Phillips, 403 F.2d 963, 964 (6th Cir. 1968); Stirone v. Markley, 345 F.2d 473 (7th Cir. 1965).

Under the circumstances of this case, considerations of due process and the Sixth Amendment right to confrontation compelled the granting of Appellant's timely request to be present at the hearing on his motion for new trial and the denial of that request, particularly in light of the insufficient burden Appellant's presence would have created, constituted an abuse of discretion.

CERTIFICATE OF SERVICE

This is to certify that I have this date served copies of the within and foregoing Brief of Appellant on Cleve Miller, District Attorney for the Northern Judicial Circuit, State of Georgia, Post Office Box 247, Elberton, Georgia 30635, Bryant Huff, District Attorney for the Gwinnett Judicial Circuit, State of Georgia, Post Office Box 569, Lawrenceville, Georgia 30246, and Michael J. Bowers, Attorney General of the State of Georgia, 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334, by placing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to assure delivery.

This 19th day of October, 1981.

Mary J. Wilkes

Mary J. Wilkes